

Application No. 10/588,360
AMENDMENT of August 3, 2010
Reply to Office Action of May 3, 2010

REMARKS/ARGUMENT

This amendment responds under 37 C.F.R. § 1.111 to the Office Action of May 3, 2010.

Claims 1 through 14 are pending in the application. Claims 1 through 14 are amended.

New claims 15 through 20 added. No new matter is added.

Initially, the Applicants wish to call the Examiner's attention to co-pending U.S. Patent Applications No. 10/587,801 and No. 10/587,802, which are directed to a similar, but patentably distinct, inventions.

1. Rejection under 35 U.S.C. § 112, Second Paragraph

Claims 1 through 14 are rejected under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Specifically, according to the Examiner:

Independent claim 1 and several other dependent claims recite component as a pyridylethylbenzamide derivative of 'general formula (I)' (emphasis added). The term 'general' renders the claim indefinite because it is not clear whether the formula given in claim 1 is merely one general possibility, i.e. the claims are open to other pyridylethylbenzamides that do not have the structure of formula (I).

By the above amendments, the terminology "general formula (I)" has been changed in all cases to "formula (I)."

At line 14 of claim 1, "as to the N-oxides of 2-pyridine thereof" is unclear, grammatically incorrect, and lacks antecedent basis.

The phrase "as to the N-oxides of 2-pyridine thereof" has now been amended to read "and to the N-oxides of 2-pyridine thereof." It is respectfully submitted that the amended phrase is both

Application No. 10/588,360
AMENDMENT of August 3, 2010
Reply to Office Action of May 3, 2010

clear and grammatically correct. It is further submitted that the single pyridine ring of formula I in the claim provides the required antecedent basis.

At line 16 of claim 1, ‘the’ should be deleted from ‘the methionine biosynthesis.’
Same issue in claim 10, line 2.

By the current amendments, the definite article no longer appears before “methionine biosynthesis” in any of the claims.

Merely reciting another fungicide as ‘a fungicidal compound (c)’ is confusing and indefinite since one skilled in the art cannot possibly know, without more, what would qualify a compound as a ‘(c)’ compound. See claim 11.

Claim 11 has now been amended to read “(C) a fungicidal compound.” It is believed this rearrangement of the order, coupled with reference to claim 1, which has elements (A) and (B), eliminates any confusion or indefiniteness regarding the meaning of (C).

Improper Markush language is used in claim 12. Correct language is “selected from the group consisting of . . . and [last member].”

The claims, including claim 12, are now amended to employ proper Markush language wherever appropriate.

Accordingly, it is requested that the rejection of claims 1 through 14 under 35 U.S.C. § 112, second paragraph, be withdrawn.

Application No. 10/588,360
AMENDMENT of August 3, 2010
Reply to Office Action of May 3, 2010

2. Rejection under 35 U.S.C. § 103(a)

Claims 1 through 14 are rejected under 35 U.S.C. § 103(a) as being unpatentable over the combined teachings of WO 2004/016088 and Hubele (U.S. Patent No. 5,153,200) in view of HCAPLUS abstract 1995:694232 and Hopkinson et al. (U.S. Patent No. 6,746,988). The Applicants traverse this rejection and request reconsideration.

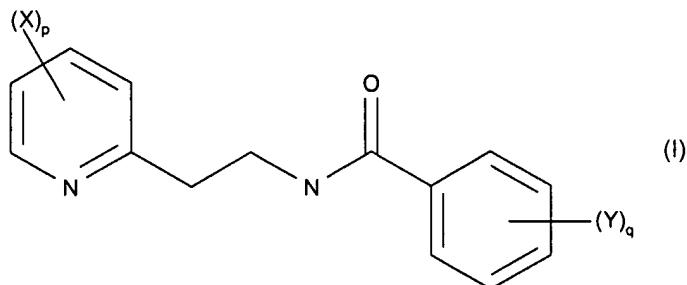
STATEMENT CONCERNING COMMON OWNERSHIP

The undersigned, the Applicants' attorney of record, states on information and belief that the present application, U.S. Serial No. 10/588,360 and Mansfield et al. (WO 2004/016088) were both, at the time the invention of the present application was made, owned by Bayer CropScience S.A. of 16 Rue Jean-Marie LeClair; F-69009 Lyon, France. Accordingly, it is submitted that the Mansfield et al. citation is unavailable as a reference against the patentability of the present invention under 35 U.S.C. § 103(c).

If, in what is deemed the unlikely event the Patent Office should determine that 35 U.S.C. § 103(c) is inapplicable here, the Applicants alternatively offer the following arguments in support of the patentability of the present claims over the cited art.

Application No. 10/588,360
AMENDMENT of August 3, 2010
Reply to Office Action of May 3, 2010

Mansfield et al. disclose compounds of general formula I,



in which p is an integer equal to 1, 2, 3, or 4; q is an integer equal to 1, 2, 3, 4, or 5; each substituent X is chosen, independently of the others, as being halogen, alkyl, or haloalkyl, at least one of the substituents being a haloalkyl; each substituent Y is chosen, independently of the others, as being halogen, alkyl, alkenyl, alkynyl, haloalkyl, alkoxy, amino, phenoxy, alkylthio, dialkylamino, acyl, cyano, ester, hydroxy, aminoalkyl, benzyl, haloalkoxy, halosulphonyl, halothioalkyl, alkoxyalkenyl, alkylsulphonamide, nitro, alkylsulphonyl, phenylsulphonyl or benzylsulphonyl; as to the N-oxides of 2-pyridine thereof; with the exception of N-{2-[3-chloro-5-(trifluoromethyl)-2-pyridinyl]-ethyl}-2,6-dichlorobenzamide.

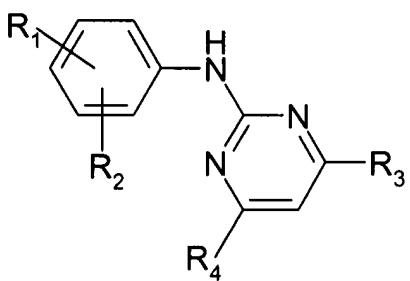
The Applicants acknowledge that pyridylethylbenzamide derivatives employed in the practice of the present invention are within the scope of the Mansfield et al. disclosure. The Applicants also acknowledge that Mansfield et al. disclose:

The compounds of the invention can also be mixed with one or more insecticides, fungicides, bactericides, attractant acaricides or pheromones or other compounds with biological activity. The mixtures thus obtained have a broadened spectrum of activity: The mixtures with other fungicides are particularly advantageous.

Application No. 10/588,360
AMENDMENT of August 3, 2010
Reply to Office Action of May 3, 2010

(WO 2004/016088, p. 7, lines 10-13.) However, there is no teaching or suggestion in Mansfield et al. of any synergistic effect obtained when such pyridylethylbenzamide derivatives are combined with compounds capable of inhibiting methionine biosynthesis, nor is there any disclosure of what the ratios of the two fungicides should be, such as the currently claimed (A)/(B) weight ratio of from 0.01 to 20.

Hubele discloses compounds of the formula



in which:

R₁ and R₂ independently of one another [sic] are hydrogen, halogen, C₁-C₃alkyl, C₁-C₂haloalkyl, C₁-C₃alkoxy, or C₁-C₃haloalkoxy; R₃ is hydrogen; C₁-C₄alkyl; or C₁-C₄alkyl substituted by halogen, hydroxy or by cyano; cyclopropyl; or cyclopropyl mono- to tri-substituted by methyl and/or by halogen; and R₄ is C₃-C₆cycloalkyl or C₃-C₆cycloalkyl mono- to tri-substituted by methyl and/or by halogen.

(U.S. Patent No. 5,153,200, Abstract.) Cyprodinil is specifically disclosed. The compounds are said to have valuable microbicidal and insecticidal properties and to be useful in plant protection for preventing an attack on cultivated plants by phytopathogenic microorganisms. There is no

Application No. 10/588,360
AMENDMENT of August 3, 2010
Reply to Office Action of May 3, 2010

disclosure or suggestion of using the combination of pyridylethylbenzamide derivatives with the compounds disclosed.

HCAPLUS abstract 1995:694232 discloses that cyprodinil is a fungicide and that its mode of action is inhibition of methionine biosynthesis. Again, there is no disclosure or suggestion of using the combination of pyridylethylbenzamide derivatives with cyprodinil.

Hopkinson et al. disclose surfactant systems comprising alkyl polyglycosides, anionic surfactants and basic compounds. Agricultural compositions comprising agriculturally active compounds, alkyl polyglycosides, anionic surfactants, and basic compounds are disclosed. The surfactant systems and agricultural compositions may further comprise nonionic surfactants.

Hopkinson et al. fail to supplement the deficiencies of Mansfield et al. and Hubele as references against the patentability of the subject invention, discussed above. At most, Hopkinson et al. teach that combinations of fungicides can be used in combination with surfactants. That this is known in the art is also acknowledged. However, there is nothing in Hopkinson et al., alone or in combination with the other cited art, that would lead a person of ordinary skill in the art to prepare a composition comprising:

- (a) a pyridylethylbenzamide derivative of a specified formula and
- (b) a compound capable of inhibiting methionine biosynthesis

in an (a)/(b) weight ratio of from 0.01 to 20.

Application No. 10/588,360
AMENDMENT of August 3, 2010
Reply to Office Action of May 3, 2010

It is understood to be the Examiner's position that (1) the pyridylethylbenzamide derivatives are known fungicides and (2) compounds that inhibit methionine biosynthesis are known fungicides and that, thus, it would be obvious to use them in combination.

It is the Applicants' position, however, that they have discovered a combination in a particular ratio that clearly exhibits synergism and is neither disclosed nor suggested by the cited art. They have demonstrated this synergism for this combination in the examples of the present specification, using means for determining synergism that are accepted in the art, i.e., the Colby formula, which was published in the journal 15 WEEDS 20-22 (1967). The Examiner's attention is directed to U.S. Patent No. 6,753,339 in which the Colby method of determining synergism was also employed to the satisfaction of the Patent Office. In fact, the Applicants' representative searched the Patent Office's Full-Text and Image Database using the keywords SPEC/Colby AND SPEC/synergism and obtained 214 hits. Clearly, the Colby method has been frequently used to the satisfaction of the Patent Office to show synergism and, consequently, non-obviousness. Based on the teachings of the cited references, skilled artisans might have expected fungicidal activity for mixtures of the pyridylethylbenzamide derivatives and the compounds used with them in the practice of the present invention, but they would not have expected any synergy when associating these compounds, in particular, in the claimed weight ratio of from 0.01 to 20. Unexpected results have been shown for the claimed combination, and it logically follows that the combination cannot be obvious.

**Application No. 10/588,360
AMENDMENT of August 3, 2010
Reply to Office Action of May 3, 2010**

It is therefore requested that the rejection of claims 1 through 14 under 35 U.S.C. § 103(a) as being unpatentable over the combined teachings of WO 2004/016088 and Hubele in view of HCAPLUS abstract 1995:694232 and Hopkinson et al. be withdrawn.

In view of the foregoing, it is submitted that this application is in condition for allowance. Favorable consideration is earnestly solicited.

Respectfully submitted,



Paul Grandinetti
Registration No. 30,754
OSTROLENK FABER LLP
1180 Avenue of the Americas
New York, New York 10036-8403
Telephone (212) 382-0700